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CHARLES ELMORE

Supreme Court of the United States

OCTOBER TERM, 1934

No. 567

SPIELMAN MOTOR SALES CO., INC.,

Complainant-Appellant,

vs.

WILLIAM C. DODGE, as District Attorney of New York County, State of New York,

Defendant-Appellee.

MEMORANDUM ON JURISDICTION

and

MOTION TO DISMISS

JOHN J. BENNETT, JR.,
Attorney-General.

HENRY EPSTEIN,
Solicitor General,
For the State of New York.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1934

No. 567

SPIELMAN MOTOR SALES CO. INC.
Complainant-Appellant,

against

WILLIAM C. DODGE, as District Attorney of New York County, State of New York,
Defendant-Appellee.

MEMORANDUM ON JURISDICTION UNDER SECTION 266 OF JUDICIAL CODE AND MOTION TO DISMISS

Now comes the State of New York by its Attorney General, John J. Bennett, Jr., and moves to dismiss the appeal of the appellant, Spielman Motor Sales Co. Inc., on the ground that under § 266 of the Judicial Code (§ 380, Title 28, United States Code) no jurisdiction was had by the three judge court below to enjoin the prosecution of a criminal offense resulting from a violation of a State statute by the District Attorney of New York County, appellee, and further for the reason that an adequate judicial process and remedy existed at law in the State courts affording to the appellant the opportunity for testing the constitutional

validity of the State statute in question (Chapter 781, Laws of 1933) under the State and Federal constitutions without undue delay or hardship.

Which foregoing relief the undersigned prays.

Yours etc.
JOHN J. BENNETT, JR.
Attorney General

HENRY EPSTEIN
Solicitor General
For the State of New York.

STATEMENT

Upon the argument of the within appeal before this court on March 11, 1935, the Honorable Chief Justice raised the question of jurisdiction under § 266 of the Judicial Code. In view of the fact that counsel had not briefed the question (a motion to dismiss on the ground of adequate remedy in the State courts having been denied by the three judge court below), this court has requested briefs upon the jurisdictional issue.

The jurisdictional question upon which the Honorable Chief Justice has indicated a desire to have memoranda involves the following:

1. Whether or not the District Attorney of New York County is a State officer or an "officer of the State" within the meaning of §266 of the Judicial Code;

2. Whether an adequate remedy at law existed in the State courts so that there was no extraordinary necessity for the exercise of the equity jurisdiction of the three judge court.

The following discussion is submitted on behalf of the State of New York by the Attorney-General in

support of the position taken by the State of New York, that jurisdiction should not have been assumed by the statutory court, and the appeal should not be received by this Honorable Court.*

PROCEEDINGS BELOW

Before the three judge court, which was convened pursuant to the provisions of the Judicial Code, § 266, the Attorney-General, appearing on behalf of the State of New York, moved with the district attorney to dismiss on the ground that an adequate remedy existed in the State courts to test the validity of the State statute under the State and Federal constitutions. Some doubt existed (Record, p. 264) in the statutory court as to the position of the Attorney-General or the State as a party. Since a State statute is attacked primarily under the State Constitution, the Attorney-General thought it advisable to appear and submit briefs on behalf of the State in support of the constitutionality of the State act. The motion to dismiss for jurisdictional defects was denied by the statutory court.

The proceeding, the restraint of which is sought in the complaint of appellant, was merely a preliminary "investigation" commenced in the Magistrate's Court of the City of New York (the equivalent of a local Police Court), to ascertain whether there had been committed a criminal offense in the nature of a violation of Chapter 781 of the Laws of 1933, known as the State Recovery Act. As a result of this inquiry it might or might not have been determined that the

* Upon the express recommendation of the Governor, an amended State Recovery Act has been introduced into the State legislative session now sitting (March 27, 1935). If enacted, the within attack upon Chapter 781, Laws of 1933, may well become academic. There are substantial changes made in procedure and substance. Copy of the proposed act is annexed hereto.—(Appendix A.)

appellant was guilty of such violation. (R., p. 12.) It was made clear upon the argument below that until the State's highest court had determined the issue raised upon such prosecution, no repeated or continued prosecutions would be undertaken, so that there was present no possibility of nuisance or irreparable damage in the form of such multiplicity of prosecution.

Counsel for complainant, however, insisted upon the need and propriety of the three judge procedure; was unwilling to submit to the proceedings in the Magistrate's Court. Had complainant done so and had a conviction resulted, the issue could squarely have been raised on a writ of habeas corpus or by appeal, testing the validity of the State act sought to be enforced.

The court below heard full argument and determined the issue as if it had been properly before it. In view of the doubt existing as to the propriety of the State being a party in the form taken by the action herein, the Attorney-General on the argument below and in his brief heretofore submitted on the present appeal, requested permission to file a brief and be heard upon the constitutional issue presented.

The State of New York takes the position that there existed no jurisdiction in the Statutory Court in the instant appeal; that no "officer of the *State*," within the meaning of § 266 of the Judicial Code, was sought to be restrained; that there were no extraordinary circumstances warranting the determination of the issue involving a State statute by a three judge court; that the alleged invalidity of the act under the Federal Constitution is merely incidental to the chief attack upon its validity under the State Constitution, and that for the foregoing reasons the appeal should be dismissed for want of jurisdiction. The motion heretofore made (R., p. 264) and submitted herewith is to the said effect and the sub-joined memorandum is in support thereof.

I.

The three judge court under the Judicial Code, § 266 (U. S. Code, Title 28, § 380), should not have assumed jurisdiction to enjoin the pending prosecution by the District Attorney of New York County for an alleged violation of a State statute on the ground of the alleged invalidity of the said statute under the State and Federal Constitutions when no extraordinary circumstances were present warranting such jurisdiction.

(a) The Jurisdiction of the Three Judge Court.

The Statutory Court of three judges authorized by § 266 of the Judicial Code is intended to expedite the determination of serious questions of constitutionality of State statutes under the Federal Constitution and to remove from the power of a single District Judge the authority by injunction to forbid the enforcement of State laws. It was intended to be operative when aimed at the action of an "officer of the State." The fact that the statute was general in its application does not authorize jurisdiction if the officer be not an "officer of the State."

Ex Parte Public Bank, 278 U. S. 101,

In the cited case Mr. Justice Sutherland pointed out the two concurrent requisites to such jurisdiction.

> "(1) The suit must seek to have a State statute declared unconstitutional, or that in effect, and
> "(2) It must seek to restrain the action of an officer of the State in the enforcement of such statute." (P. 104.)

The said case involved the collection of taxes fixed pursuant to State law. A mandamus to compel the calling of a three judge court was denied, there being lacking the second requisite, even though the statute

itself was general and the levy collected pursuant to the mandate of a State law.*

In the instant appeal the chief attack is made upon the State statute on the ground that the alleged violation thereof will deprive the appellant of liberty and property without due process of law under the State Constitution, and that the said State statute is violative of other provisions of the State Constitution. It is further attacked upon the ground that it likewise violates the Fifth and Fourteenth Amendments to the Federal Constitution. The attack upon the State statute under the Federal Constitution is secondary and incidental to the attack under the State Constitution. Since the due process clause of the New York State Constitution (Art. I, § 6) is in effect the same in application as the due process clause of the Federal Constitution, the issue would be determined as readily in the State courts as in the Federal courts.

The attack upon the National Industrial Recovery Act, as the basis upon which the State act was enacted, is incidental and it is respectfully submitted that no such indirect method should be permitted as an avenue of approach to the three judge court under § 266 of the Judicial Code.

In *Stratton, Secretary of State of Illinois*, v. *St. Louis S. W. Ry.*, 282 U. S. 10 the jurisdictional question was raised. This court reversed and remanded for want of jurisdiction.

* A thorough discussion of the jurisdiction of the three judge court under § 266 of the Judicial Code is found in 47 Harvard Law Review, 795—"A case for Three Judges," J. C. Hutcheson, Jr. "Congress had shown an intent to recognize a suit in the State court to enforce the law as a more appropriate proceeding to settle the validity of the State statutes than a suit in the Federal court to enjoin its enforcement." (47 Harvard L. Rev., p. 824.)

General Outdoor Advertising v. *Williams*, 9 Fed. (2nd) 165 —Reversed 12 Fed. (2nd) 773.

> "The statute applies only where there is a substantial claim of invalidity under the Federal Constitution and where an application for an interlocutory injunction, for the purposes contemplated by the statute, is made and pressed. *Ex parte Buder*, 271 U. S. 461, 463, 467; *Ex parte Hobbs*, 280 U. S. 168, 172."

In *Oklahoma Gas Co.* v. *Packing Co.*, 292 U. S 386, this court held (p 391):

> "The three judge procedure is an extraordinary one imposing a heavy burden on federal courts with attendant expense and delay. That procedure, designed for a specific class of cases, sharply defined, should not be lightly extended."

Mr. Justice Stone there pointed out that it should be invoked only if the suit is to restrain the action of "State officers."

(b) The District Attorney of New York County Should Not Be Regarded as a State Officer in the Sense That That Term Is Used in § 266 of the Judicial Code.

Historically District Attorneys in New York State have performed State functions in respect of the prosecution of criminal offenses. For over a century, however, they have been independent of the State's Attorney-General, the head of the Law Department of the State government. Their duties in the prosecution of criminal offenses, while nominally a State function, do not bring them within the definition of a "State officer" with general jurisdiction in the State. *They are officers with jurisdiction confined to a county; they are elected by the voters of a county; compensa-*

tion fixed by the county authorities and paid by the county. The Attorney-General of the State is not authorized to prosecute offenses generally and has no such jurisdiction under Chapter 781 of the Laws of 1933, the statute here in question.

The State Public Officers Law, § 2, defines State officers and local officers and by this definition the District Attorney clearly does not come within the scope of the language "an officer of the State" or "State officer."*

The proper procedure for plaintiff herein was an action to enjoin the Secretary of State as the filing or administrative officer under the statute here attacked. (Ch. 781, L. 1933, § 2.) In such case a proper "State officer" would have been the defendant and an administrative act would have been the procedure attacked. Thereby the validity of the statute might in its inception have been determined. A three judge court might then have convened.

In the present case, however, there has been sought a method, which, if adopted and general in application, may completely destroy the effectiveness of prompt prosecutions of criminal acts under State statutes for violations thereof. This would indeed be a readily adaptable mode of attack upon a State statute via the Federal courts.

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* § 2. *Definitions.* The term "State officer" includes every officer for whom all the electors of the State are entitled to vote, members of the Legislature, justices of the Supreme Court, regents of the university, and every officer, appointed by one or more State officers, or by the Legislature, and authorized to exercise his official functions throughout the entire State, or without limitation to any political subdivision of the State, except United States Senators, members of Congress, and electors for President and Vice-President of the United States. The term "local officer" includes every other officer who is elected by the electors of a portion only of the State, every officer of a political subdivision or municipal corporation of the State, and every officer limited in the execution of his official functions to a portion only of the State. The office of a State officer is a State office. The office of a local officer is a local office.. (Public Officers Law of N. Y. State, Section 2 complete.)

Although in some earlier cases jurisdiction was assumed upon direct appeal in instances involving prosecuting officers (*Noble* v. *Douglas*, 261 U. S. 165; *Gulf Fisheries Co.* v. *MacInerney*, 276 U. S. 124; *Fenner* v. *Boykin*, 271 U. S. 241), nevertheless in the instant case the language of Mr. Justice McReynolds in *Fenner* v. *Boykin* is persuasive that jurisdiction should be declined:

> "The accused should first set up and rely upon his defense in the State courts, even though this involves a challenge of the validity of some statute, unless it plainly appears that this course would not afford adequate protection. The Judicial Code provides ample opportunity for ultimate review here in respect of federal questions. An intolerable condition would arise, if, whenever about to be charged with violating a State law, one were permitted freely to contest its validity by an original proceeding in some federal court. (*Hygrade Provision Co.* v. *Sherman*, 266 U. S. 497, 500. 45 S. Ct. 141, 69 L. Ed. 402.)"

Mr. Justice McReynolds further pointed out that there should be no interference with said prosecutions unless "absolutely necessary for the protection of constitutional rights."

It should be noted that in *Cline* v. *Frink Dairy Co.*, 274 U. S. 445 (affirming a three judge court as to threatened prosecutions) the pending prosecution was not restrained and there was a reversal as to that action. The court indicated that it was necessary to evidence irreparable damage and multiplicity of actions and that the court would be loath to restrain a single criminal prosecution under a State statute although it might restrain continued prosecution pend-

ing the determination of the validity of the statute attacked.

None of these factors is present in the instant appeal. No prosecution had been commenced; a preliminary investigation was about to be set in motion and there was no threat to continue prosecutions, pending the determination of the validity of the one prosecution if undertaken following such preliminary investigation.

The restraint sought in the within action before the three judge court was premature. The remedy in the State courts to test the validity of the statute following a prosecution for violation thereof was expeditious and adequate. That orderly method of procedure should not be jeopardized through the process of the three judge court. This court should mark very strictly the limits of the restraints to be placed upon local prosecuting officers in matters of alleged violations of State statutes. Criminal prosecutions should be as free from restraints as possible; particularly so, where the method of testing the validity of the State statute by a proceeding against an administrative State official could have been had. (In this case, the Secretary of State.)

Triangle Mint Corporation v. *Mulrooney*, 257 N. Y. 200.

"An equity court should exercise its jurisdiction to restrain the police power from enforcing a criminal statute, the enforcement of which threatens property damage, only in cases where a clear legal right to that relief is established." (P. 201.)

No such situation is presented in the present case and if the alleged damage could have been shown to be impending the State courts would likewise have been available to restrain such threatened irreparable damage.

The position of the Attorney-General under the Executive Law of New York State, § 62, does not create a District Attorney a State officer.*

By such section the Attorney General is permitted, upon designation of the Governor, to supersede a District Attorney in respect of any criminal prosecution pending. Unless, however, and until this action is taken, it cannot be said that the District Attorney is a State officer by reason of the possible relationship which may on occasion be created. It is submitted that the provisions of § 266 of the Judicial Code refer to a State officer in the sense of one who has general State duties to perform and is not restricted to a particular geographic subdivision of the State in his functions.

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* "§ 62. *General duties.* The attorney-general shall: 1. Prosecute and defend all actions and proceedings in which the state is interested, and have charge and control of all the legal business of the departments and bureaus of the state, or of any office thereof which requires the services of attorney or counsel, in order to protect the interests of the state, but this section shall not apply to any of the military department bureaus or military offices of the state.

2. Whenever required by the governor, attend in person, or by one of his deputies, any term of the supreme court or appear before the grand jury thereof for the purpose of managing and conducting in such court or before such jury such criminal actions or proceedings as shall be specified in such requirement; in which case the attorney-general or his deputy so attending shall exercise all the powers and perform all the duties in respect of such actions or proceedings, which the district attorney would otherwise be authorized or required to exercise or perform; and in any of such actions or proceedings the district attorney shall only exercise such powers and perform such duties as are required of him by the attorney-general or the deputy attorney-general so attending. In all such cases all expenses incurred by the attorney-general, including the salary or other compensation of all deputies employed, shall be a county charge. . . ."

(C) The Appearance of the Attorney-General and the Service upon the Governor and the Attorney-General in the Action Do Not Bring This Case Within the Scope of § 266 of the Judicial Code.

The Attorney-General may appear and is required in certain circumstances to appear in defense of the validity of State statutes whose constitutionality is attacked. (§ 68, Executive Law, New York State.)*

The appearance of the Attorney-General in the action before the court below was pursuant to service upon him and upon the Governor. This appearance and his participation thus far are in accordance with the policy and established practice of the Attorney-General's office in cases where the constitutional validity of State statutes is attacked. It does not amount to any concession of participation by the State as such in the proceeding, nor should it be regarded in and of itself as sufficient to warrant the assumption of jurisdiction by the statutory three judge court.

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* § 68. *Attorney-general to appear in cases involving the constitutionality of an act of the Legislature.* Whenever the constitutionality of a statute is brought into question upon the trial or hearing of any action or proceeding, civil or criminal, in any court of record of original or appellate jurisdiction, the court or justice before whom such action or proceeding is pending, may make an order, directing the party desiring to raise such question, to serve notice thereof on the attorney-general and that the attorney-general be permitted to appear at any such trial or hearing in support of the constitutionality of such statute. The court or justice before whom any such action or proceeding is pending may also make such order upon the application of any party thereto, and the court shall make such order in any such action or proceeding upon motion of the attorney-general. When such order has been made in any manner herein mentioned it shall be the duty of the attorney-general to appear in such action or proceeding in support of the constitutionality of such statute. (Executive Law of N. Y. State, Section 68 complete.)

CONCLUSION

For the foregoing reasons, it is respectfully urged that the instant appeal be dismissed for want of jurisdiction.

JOHN J. BENNETT, JR.,
Attorney-General of the State of New York

HENRY EPSTEIN,
Solicitor-General,
Of Counsel,

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APPENDIX "A"

STATE OF NEW YORK

No. 2412 **Int. 1966**

IN SENATE

March 27, 1935

AN ACT

To amend chapter seven hundred and eighty-one of the laws of nineteen hundred thirty-three, entitled "An act to provide for codes of fair competition for trades, industries and subdivisions thereof, agreements, licenses, rules and regulations pursuant to the provisions of the national industrial recovery act, enacted by the congress of the United States, effective June sixteenth, nineteen hundred thirty-three, as affecting intrastate commerce within the state," generally, and repealing section six thereof, relating to licenses

Section 1. The title and sections one, two, three, five, seven and eight of chapter seven hundred and eighty-one of the laws of nineteen hundred thirty-three, entitled "An act to provide for codes of fair competition for trades, industries and subdivisions thereof, agreements, licenses, rules and regulations pursuant to the provisions of the national industrial recovery act, enacted by the congress of the United States, effective June sixteenth, nineteen hundred thirty-three, as affecting intrastate commerce within the state," are hereby amended to read, respectively, as follows:

An act to provide for codes of fair competition for trades, industries and subdivisions thereof, agreements, [licenses] *orders,* rules and regulations pursuant to the provisions of the national industrial recovery act, enacted by the congress of the United States, effective June sixteenth, nineteen hundred thirty-three, as affecting intrastate commerce within the state.

EXPLANATION—Matter in *italics* is new; matter in brackets [ ] is old law to be omitted. This statute is pending at the date of this writing, April 1, 1935.

Section 1. Legislative finding; statement of policy. A national emergency productive of widespread unemployment and disorganization of industry, which likewise prevails in the state of New York, which burdens intrastate, interstate and foreign commerce, affects the public welfare, and undermines the standards of living of the American people and of the people of the state of New York, is hereby declared to exist. The existence in this state of such present acute economic emergency, and the effects and certain causes thereof as declared in section one of title one of the national industrial recovery act, enacted by the congress of the United States, effective June sixteenth, nineteen hundred thirty-three, are hereby recognized; and it is hereby declared that said emergency, the causes and effects thereof, as so declared, relate as well to commerce in this state wholly intrastate in character as to interstate and foreign commerce and transactions affecting interstate and foreign commerce carried on in this state. It is hereby declared to be the policy of this state to cooperate in the furtherance of the objects and purposes declared in said act of the congress, and each and every provision of this act shall be construed in accordance with the policy so declared, and to make uniform the standards of fair competition prevailing in intrastate commerce and industry with those of interstate commerce required by the provisions of the said national industrial recovery act which are applicable in interstate commerce in the state of New York. *The legislature hereby reaffirms and redeclares the foregoing statements of facts, findings and policies and hereby further finds and it is hereby further declared to be the purposes of this act, and the policies of this state, to supplement and to cooperate in effectuating national*

policy, to meet the emergency, to insure uniformity of state regulation of commerce with national regulation, to remove obstructions to the free flow of commerce which tend to diminish the amount thereof, and to provide for the general welfare by promoting the organization of industry for the purpose of cooperative action among trade groups, by inducing and maintaining cooperation of labor and management under adequate governmental sanctions and supervision, by eliminating unfair competitive practices, by promoting the fullest possible utilization of the present productive capacity of industries, by increasing the consumption of industrial and agricultural products, by increasing purchasing power, by reducing and relieving unemployment, by improving standards of labor, and otherwise rehabilitating industry and conserving natural resources.

§ 2. Filing of codes and agreements. 1. The secretary of state is hereby authorized to receive for filing and shall file in the office of the department of state a copy of each code *of fair competition*, agreement, [license] *order*, rule or regulation in effect pursuant to [such act of the Congress] *title one of the national industrial recovery act, and any act amendatory thereof*, pertaining, affecting or in any way relating to the conduct of business in the state and duly certified as a true copy of such document or documents by the officials in charge of the administration of the provisions of title one of the said national industrial recovery act, *and any act amendatory thereof*, or by their duly authorized agents. *For the purposes of this section the imprint of the United States government printing office, Washington, District of Columbia, shall be equivalent to certification.* Upon such filing of a copy so certified *or imprinted* of a code of fair

competition for any trade, industry or subdivision thereof, as approved by the president of the United States, or of any agreement, [or license] *order,* [or of any] rule or regulation provided for under title one of the said national industrial recovery act, *and any act amendatory thereof,* such code, agreement, [license] *order,* rule or regulation shall by *virtue of this act* be the standard of fair competition for such trade or industry or subdivision thereof in the state as to transactions intrastate in character, *provided, however, that the following standards, requirements and conditions shall have been complied with in the promulgation of any such code of fair competition and/or agreement:*

(a) That such code of fair competition shall have been submitted by one or more trade or industrial associations or groups which impose no inequitable restrictions on admission to membership therein and are truly representative of such trades or industries or subdivisions thereof.

(b) That such code of fair competition or agreement shall have been found not designed to promote monopolies or to eliminate or oppress small enterprises and will not operate to discriminate against them and will tend to effectuate the policies set forth in section one of this act.

(c) That such code of fair competition or agreement shall contain a provision that employers shall comply with the maximum hours of labor, minimum rates of pay, and other conditions of employment prescribed in any such code of fair competition or agreement.

The conformity of any code of fair competition or agreement with the standards, requirements and conditions contained in paragraphs (a) (b) and (c) of this section, shall be a prerequisite to the filing of such code of fair competition or agreement with

the secretary of state; provided, however, that every code of fair competition or agreement in effect pursuant to such or any act amendatory thereof shall be presumed to comply with the foregoing standards, requirements and conditions, and any findings made or entered by the president, or his duly constituted agent or agents therefor, pursuant to such act or any act amendatory thereof shall be deemed prima facie proof of conformity with such standards, requirements and conditions, and shall be the authority to the secretary of state for the filing of such code of fair competition or agreement, unless the secretary of state shall within fifteen days of the filing thereof, except as to such codes or agreements as have heretofore been filed, in which case, within fifteen days from the date this section, as hereby amended, takes effect, make a specific finding that such code or agreement does not conform with such standards, requirements and conditions or does not tend to effectuate the policies of this act, in which case such code or agreement shall not become effective or shall thereafter have no force or effect hereunder. [and any] *Any* violation of any provision of such code *of fair competition*, agreement, [license] *order*, rule or regulation shall be a misdemeanor, and upon conviction thereof, the person convicted shall be fined not more than five hundred dollars for each offense, and for each day such violation continues a separate offense subject to the fine herein prescribed shall be deemed to have been committed.

2. The secretary of state shall cause to be printed *or purchased from the United States government printing office* a sufficient number of copies of each such code, agreement, [license] *order*, rule or regulation and the same shall be kept available for distribution upon request therefor

3. If in any such code, agreement, [license] *order*, rule or regulation, power is conferred upon any person or group of persons to subpoena witnesses, compel the production of books, papers and records, the attendance of witnesses or to take their testimony, a like power shall be deemed to have vested in such person or group of persons with regard to matters and things of a wholly intrastate character.

§ 3. Jurisdiction of court. The supreme court of the state of New York is hereby invested with jurisdiction to prevent and restrain violations of any code of fair competition, agreement, [license] *order*, rule or regulation, filed pursuant to this act, and to prevent and restrain the commission within this state of any act tending to defeat or hamper the operation and effectiveness, within the state, of such act of the congress at the instance of any party whose interests are or may be adversely affected by such violation or acts *or at the instance of any code authority, or any officer thereof duly appointed or elected under the provisions of any such code, agreement, order, rule or regulation to administer any such code of fair competition or agreement which has been so violated.* Nothing in this section contained, however, shall in any wise affect the criminal liability for violations of such codes, agreements, [licenses] *orders*, rules or regulations. Provided, however, that nothing in this act shall be construed by any public official or court as declaring illegal the right of workers to organize; to adopt a constitution and by-laws and enforce the same and the right to control and direct the members of such organization in accordance with such constitution and by-laws; that no provision of this act shall be construed to compel workers or employees to continue at their work; or to declare an act illegal of an organization to collectively cease work,

or its officers directing the cessation of work of its members.

§ 5. Exemption from anti-trust laws; application of labor laws. While this act is in effect and for sixty days thereafter, any code *of fair competition,* agreement, [license] *order,* rule or regulation in effect under this act, and any action complying with the provisions thereof taken during such period, shall be exempt from the provisions of article twenty-two of the general business law, or of any other provisions of law, to the extent that such provisions of law are inconsistent with the provisions of such code, agreement, [license] *order,* rule or regulation. Nothing in this act contained, however, shall be construed in any way to alter, modify or affect the provisions of existing laws of this state in such manner as to permit any change in public utility rates except with the permission and approval of the public service commission or [as] to lower the standards therein provided with regard to labor, hours of labor, wages for labor and employment of females and children.

§ 7. Letting of public contracts. [Every] *No* department, board, bureau, agency, authority, commission, public body or officer of the state or of any political subdivision thereof or district therein charged with the duty of letting or awarding contracts for (a) the construction, alteration or repair of public works or (b) the purchasing of materials or supplies, shall, notwithstanding any inconsistent provision of law, let or award such contracts, *unless invitations to bidders shall contain a provision to the effect that no bid shall be considered unless it is accompanied by a certificate, duly executed by the bidder, stating that the bidder is complying with and will continue to comply with each approved code of fair competition or agreement to which he is subject; and*

every such contract and purchase order shall contain a provision to the effect that the party awarded any such contract or purchase order shall comply with each code of fair competition or agreement to which he is subject; and provided further, all such contracts or purchase orders shall contain a provision to the effect that such party, in the fulfillment of such contract or purchase order, shall not accept or purchase for the performance of such contract or purchase order, or enter into any sub-contracts for any articles, materials, services or supplies, in whole or part purchased or furnished by any person who has not certified to such party that he is complying with and will continue to comply with each code of fair competition or agreement which relates to such articles, materials, services and supplies; and further, all such contracts shall contain a clause or provision that the department, board, bureau, agency, authority, commission, public body or officer of the state, or of any political subdivision thereof or district therein charged with the duty of letting or awarding such contracts shall have the right to cancel the contract for failure to comply with such codes or agreements as aforesaid [only to such persons or corporations, otherwise qualified, who or which will agree in and by the terms of such contract to use or supply only articles, materials and supplies which have been or will be mined, produced, manufactured or supplied, as the case may be, by a person or corporation who or which is a party or subject to a code of fair competition, agreement or license, approved, prescribed or issued under the said national industrial recovery act for the trade, industry or subdivision thereof mining, producing, manufacturing or supplying such articles, materials or supplies].

§ 8. Duration. This act, in so far as it affects agreements, codes, *orders*, rules or regulations, shall become ineffective contemporaneously with the expiration of said national industrial recovery act[, provided for by section two (c) of said act, and in so far as it affects licenses, contemporaneously with the expiration of the said national industrial recovery act, as provided for in section four (b) of said act]* or any act amendatory thereof.*

§ 2. Section six of such chapter is hereby repealed and such chapter is hereby amended by inserting therein a new section, to be section six, to read as follows:

§ 6. Action by employees for non-payment of wages. Any employer subject to the provisions of any such code of fair competition or agreement who pays an employee wages at a rate below the minimum provided for therein shall be liable to pay and shall pay to any such employee the difference between the wages actually received by such employee and those to which such employee would have been entitled, if paid at the minimum rate provided for by such code or agreement, and such employee may bring an action to recover such sum in any court of competent jurisdiction.

§ 3. This act shall take effect immediately.

SUPREME COURT OF THE UNITED STATES.

No. 567.—October Term, 1934.

Spielman Motor Sales Co., Inc., Appellants, *vs.* William C. Dodge, as District Attorney of New York County, State of New York.	Appeal from the District Court of the United States for the Southern District of New York.

[April 29, 1935.]

Mr. Chief Justice Hughes delivered the opinion of the Court.

Appellant, a retail dealer in automobiles in the City of New York, brought this suit to restrain the District Attorney of New York County from instituting a criminal prosecution for alleged violation of the "Code of Fair Competition for the Motor Vehicle Retailing Trade". Appellant alleged that he was threatened with prosecution under Chapter 781 of the Laws of 1933 of the State of New York, which made it a misdemeanor to violate any provision of a code of fair competition as approved by the President of the United States under Title I of the National Industrial Recovery Act. 48 Stat. 195. It appears that the charge of violation of the code related to the provisions which limited the amount to be allowed for an old car "traded in" as part payment for a new car and required the maintenance of factory list prices, plus certain charges, with a prohibition against discounts, gratuities, etc. for the purpose of inducing purchases. The state statute was challenged as repugnant to the Constitution of the State, by reason of an improper delegation of legislative power, and also as effecting a deprivation of liberty and property without due process of law in contravention of the Fourteenth Amendment of the Constitution of the United States.

Appellant's application for an interlocutory injunction was heard in the District Court by three judges. Jud. Code, sec. 266, 28 U. S. C. 380. There was also a motion by the defendant to dismiss the bill of complaint upon the grounds, among others, that it failed to allege facts constituting an equitable cause of action, and